

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**





76-7426  
77-7032

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P/S

To be argued by: Jack P. Levin

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

Nos. 76-7426  
77-7032

RAYMOND G. LASKY, et al.,

Plaintiffs-Appellees,

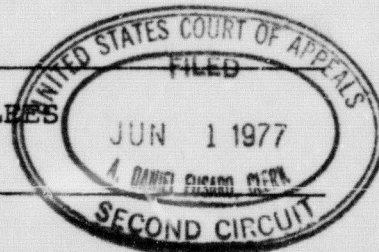
-against-

SHERIFF LAWRENCE QUINLAN, et al.,

Defendant-Appellant.

On Appeal From Orders of the  
United States District Court  
for the Southern District of New York

BRIEF OF PLAINTIFFS-APPELLEES



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On Appeal From Orders of the  
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BRIEF OF PLAINTIFFS-APPELLEES

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PRELIMINARY STATEMENT

These are appeals by defendant Lawrence M. Quinlan, Sheriff of Dutchess County, New York (the "Sheriff") from a contempt judgment of the United States District Court for the Southern District of New York (Wecker, J.), entered July 7, 1976 pursuant to an opinion filed June 22, 1976 and from a judgment for plaintiffs' attorney's fees and expenses entered December 13, 1976 pursuant to the opinion entered July 7, 1976 and a memorandum decision filed November 24, 1976.



QUESTIONS PRESENTED

1. Whether the District Court's finding that the Sheriff wilfully failed to comply with the District Court's 1973 order was clearly erroneous?

2. Whether the granting of complete relief to the plaintiffs required that the County of Dutchess be made a party to this action?

3. Whether attorney's fees were properly awarded for the investigation and prosecution of the contempt proceeding?

### INTRODUCTION

The central issue on this appeal is whether the Sheriff, who settled a prisoners' rights action by agreeing to make reforms clearly within his power, may disregard that settlement agreement for three years and then defend against a motion for civil contempt by arguing that he never had the power to abide by his own agreement. The District Court emphatically rejected that argument in a June 22, 1976 opinion finding that the Sheriff had wilfully failed to comply with the Stipulation of settlement (110a; 419 F. Supp. 799).\*

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\* This copy of plaintiffs-appellees' brief has been amended to include citations to the deferred appendix, and to correct typographic errors.



## STATEMENT OF THE CASE

### A. Procedural Background

This action was commenced on April 16, 1973 by the filing of a pro se class action complaint by five inmates at the Dutchess County Jail (the "Jail"), Poughkeepsie, New York (6a). The complaint, which sought injunctive and declaratory relief, charged the Sheriff and certain Jail personnel with violations of inmates' constitutional rights and violation of 42 U.S.C. § 1983. Jurisdiction was invoked under 28 U.S.C. §§ 1343, 2201 and 42 U.S.C. § 1983.

Hon. Murray I. Gurfein, then a Judge of the District Court, appointed counsel to represent the inmates and ordered an evidentiary hearing. The hearing was held on July 2, 3, 5 and 6, 1973. The Court heard substantially uncontradicted testimony from plaintiffs, defendants and defense witnesses which established that the Dutchess County Jail was being operated in violation of - and in sometimes conscious disregard of - federal and New York law, primarily with respect to classification of inmates, inmate personal hygiene, health services, food, recreation, communication, reading materials, legal assistance, discipline and physical plant.

After visiting the Jail on July 13, 1973, Judge Gurfein suggested that counsel attempt to agree on improvements

in conditions. Plaintiffs' counsel drafted a Stipulation requiring the Sheriff to make specific administrative and some physical changes to correct violations in these areas (27a). The Stipulation was signed by counsel for both sides and submitted to the District Court.

On July 30, 1973 the District Court issued an Order approving the Stipulation and establishing certain additional requirements with respect to promulgation and distribution of inmate rules and regulations (80a). The Order also directed that mail between inmates and plaintiffs' counsel be treated as "special correspondence" as defined in the Stipulation. (82a).

The action was dismissed upon the filing of the Stipulation, "subject to reopening or the institution of contempt proceedings in the event of a wilful failure to comply with the aforementioned order of the Court." Judge Gurfein found "no need to declare this a class action, since I can find nothing substantial in a constitutional sense that is likely to be added because of a class determination." (82a).

Beginning on September 4, 1973, plaintiffs' counsel attempted to secure compliance with the Stipulation and Order (35a). Despite repeated efforts by counsel, the Sheriff refused to make the agreed upon improvements.



See pp. 40-41, infra.

On December 8, 1975 - after two and one-half years of efforts to secure compliance - plaintiffs moved pursuant to 18 U.S.C. § 401 and Local Civil Rule 14 for an order of the District Court (1) adjudging the Sheriff to be in civil contempt of the 1973 Order, (2) compelling compliance with that Order and (3) awarding to plaintiffs' counsel reasonable attorney's fees and the costs incurred in prosecuting the action (62a). The contempt hearing took place at the Bankruptcy Court in Poughkeepsie, New York on February 3, 4, 5, and 6, 1976.

B. The Opinion Below

On June 22, 1976, the District Court entered an opinion pursuant to Rule 52 of the Federal Rules of Civil Procedure rejecting the Sheriff's sole defense of inability to comply and finding that the Sheriff had wilfully failed to comply with nearly every provision of the 1973 Stipulation and Order (110a; 419 F. Supp. 799).

The District Court specifically found that the Sheriff's agreement to comply with the lighting provisions of the Stipulation, even though he never intended to provide the required lighting, amounted to "a fraud on the court and is indicative of the Sheriff's approach to his obligations as imposed by the court in the original order." (125a; 419

F. Supp. at 807). The District Court found further that "[t]he administration of the jail at this time is shocking. It shows a completely insensitive attitude on the part of the Sheriff and on the part of his principal administrator and a total lack of concern." (127a; 419 F. Supp. at 808).

The District Court squarely rejected the defense, asserted here, that the Sheriff was powerless to make the mandated changes because he failed to receive the necessary funding from the Legislature (126a; 419 F. Supp. at 808).

After finding the Sheriff in wilful contempt for noncompliance, the Court assessed a fine against him in the amount of \$500. The Court directed that the Sheriff comply with the terms of the Stipulation, within 30 days, or submit a plan for compliance. The Court gave notice that thereafter the Sheriff would be fined \$50 per day for continuing contempt until a plan for compliance was filed and approved by the Court. (127a; 419 F. Supp. at 808).

The Court appointed the Commissioner of the Dutchess County Health Department as the Court's monitor and ordered the Sheriff to furnish to the Court and to plaintiffs' counsel a monthly report as to the manner in which the Stipulation was being complied with. The Health Department was directed to make monthly examinations of the Jail and to confirm to the Court that the Sheriff's report



was in fact a true and correct statement of the actions being taken by him to achieve compliance. The Sheriff would be subjected to an additional daily fine of \$50 for failure to comply until the deficiencies were corrected. The Court further noted that persistent inaction by the Sheriff would result in a hearing upon notice to determine whether the Jail should be closed. (127a-128a; 419 F. Supp. at 808). Plaintiffs' attorney's fees and expenses were assessed against the Sheriff in an amount to be determined after a written submission and a hearing (128a; 419 F. Supp. at 809).

Papers in support of the application for attorney's fees and expenses were filed on July 20, 1976 (133a). A hearing with witnesses was held on that application on September 8, 1976 (152a-194a). A memorandum decision approving the award of attorney's fees and expenses to plaintiffs' counsel was filed on November 24, 1976 (195a).

C. Further Proceedings

Although not relevant to this appeal, certain proceedings subsequent to the contempt judgment and award of attorney's fees are featured prominently in the Sheriff's brief and must therefore be accurately described here.

At the September 8, 1976 hearing to fix plaintiffs' attorney's fees and expenses the District Court was

apprised of the Sheriff's continuing failure to comply with the 1973 Stipulation and Order and to submit a plan in accordance with the contempt order entered July 7, 1976. (171a-194a). On October 16, 1976 plaintiffs filed a motion for further contempt sanctions seeking an order adjudging the Sheriff to be in contempt of the two previous orders, imposing daily fines upon him, incarcerating him until he complied, appointing a receiver to assume administrative control of the Dutchess County Jail and awarding to plaintiffs' counsel attorney's fees and expenses incurred in prosecuting the action since the entry of the contempt order (Notice of Motion for Further Contempt Sanctions at 1-2).

A hearing on the motion for further contempt sanctions was held by the District Court on October 28, 1976 (200a-287a). At that time plaintiffs presented documentary evidence and testimony of the Sheriff's failure to comply by the Court-appointed monitor and by an investigator of the New York State Commission of Correction. The District Court reserved decision on plaintiffs' motion.

The District Court determined that the Sheriff's continuing refusal to comply with the Court's orders necessitated joining the County of Dutchess, the County Executive and the County Legislature and its members (the "County



defendants") as defendants in order to secure relief (278a, 282a). On October 16, 1976, the District Court moved by order to show cause to amend the complaint to include these parties as defendants (198a). Argument was had on the Court's motion at the October 28, 1976 hearing on plaintiffs' motion for further contempt sanctions (260a-286a).

At that hearing the Court indicated that it would join the new parties in order "to have complete control of the situation to see that things are done." (282a). In addressing the Dutchess County Attorney the District Court explained the need to join these new defendants at that stage.

"I feel that you are necessary parties. In order to fashion any relief, that is going to be -- to in some way establish these minimal constitutional rights for these individuals in the jail, you are a party." (278a).

On November 11, 1976 a conference was held in chambers attended by the Sheriff, his counsel, plaintiffs' counsel, the Dutchess County Executive, members of the Dutchess County Legislature and the Dutchess County Attorney. The purpose of the conference was to seek some resolution of the problem of administering the Dutchess County Jail without requiring the District Court to rule on the pending motion for further contempt sanctions, which included

a request for the appointment of a receiver.

It was agreed by all counsel and the Court that the Sheriff would yield all de facto control over the Jail to a warden-administrator to be proposed by the County, selected by the Court, ultimately responsible to the Court and paid by the County until such time as legislation could be enacted to remove the Sheriff's de jure control over and liability for the Dutchess County Jail. That agreement among counsel and the Court was formalized in an order entered by the Court on December 26, 1976 appointing a warden-administrator and setting forth his duties.

The County defendants ultimately appealed from the Court's October 28, 1976 ruling including them as defendants in the action. (Dkt. No. 77-7061). That appeal was withdrawn without prejudice to renewal in a stipulation approved by this Court on April 27, 1977.



### STATEMENT OF FACTS

The District Court opinion filed June 22, 1976 (110a) held that the Sheriff had wilfully failed to comply with the 1973 Stipulation (27a). That Stipulation in large part required the Sheriff to effect changes in the administration of the Dutchess County Jail, many of which the Sheriff was already bound to implement under the Minimum Standards and Regulations for Management of County Jails and Penitentiaries, 7 N.Y.C.R.R. §§ 5100.1 et seq. (the "Minimum Standards") (83a-99a). Those changes cost nothing, yet the Sheriff wilfully failed to make them. The Stipulation also required the Sheriff to plan and execute certain physical changes at the Jail and create certain programs which would require funding and which would therefore require application by the Sheriff to legislative and executive bodies, particularly at the county level. The Sheriff failed to make those applications and consistently rejected offers of assistance.

The District Court's findings of fact made pursuant to Rule 52 of the Federal Rules of Civil Procedure are based upon clear and convincing evidence that the Sheriff wilfully violated nearly every provision of the 1973 Stipulation and Order. The evidence supporting these findings is summarized below.

A. Classification of Inmates

The Stipulation provided that pre-trial detainees not be housed with convicted prisoners; that minors not be housed with adults and that housing and separation of inmates conform to the Minimum Standards. There was, however, no scheme in effect to insure that such classification was maintained. (Swiderek 20-21, 118-119).\*

As late as one month before the contempt hearing classification requirements were not met even though the Jail was not overcrowded or lacking in space (Swiderek 12, 17, 18). Some inmates were not assigned to cells and had to sleep lying on the floor (Swiderek 30; Pl. Ex. 28, Dec. 15, 1975 entry p. 18). There was no routine for determining whether a newly-admitted inmate was physically or mentally ill, suicidal or likely to be the victim of a homosexual assault (Swiderek 21, 23-24, 118-119, 135-136). One month before the contempt hearing an inmate was housed among the Jail's general population even after he had attempted suicide (Swiderek 136-138). A guard assigned to perform the necessary constant observation of certain inmates could not always do so without neglecting other inmates. (Pl. Ex. 27, Aug. 26, 1975 entry #1).

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\* The transcript of the contempt hearing is referred to by the name of the witness whose testimony supports the statement of fact and the page number at which that testimony appears in the transcript. Other references are to exhibits received in evidence at the contempt hearing.



Even in the midst of the contempt hearing "the court was required to direct the Sheriff to remove from the Dutchess County Jail such inmates who were not within classification." (111a; 419 F. Supp. at 801). The District Court rejected the Sheriff's testimony that he was unable to classify inmates properly and that he had done what he could to be in compliance. The District Court noted that

"the Sheriff, aware that the jail was not in compliance with the order as entered by Judge Gurfein, made no communication to the court for clarification of the order or to be relieved of his responsibilities under it. To the extent he was able to comply without effort, he did so. Otherwise he willfully continued to operate the Jail without properly classifying the inmates." (112a; 419 F. Supp. at 801).

B. Inmate Personal Hygiene

The Stipulation provided that inmates receive clean linen on admission to the Jail, that linen and institutional clothing be exchanged at least weekly, that bedding should be laundered before being reissued, that inmates bathe immediately on admission and that inmate hygiene conform with the Minimum Standards (27a-28a). There were, however, no written procedures or other guidelines for determining what personal articles a newly-admitted inmate would receive (Vincent 567-568; Quinlan 704-705, 708, 711).

Sometimes there was no linen or bedding at all (Swiderek 60; Pl. Ex. 27, Aug. 17, 1975 entry #4; Dec. 8, 1975 entry; Jan. 24, 1976 entry 12 P.M.; Dvorocsik 154; Rose 269; Walker 281-282). The Sheriff admitted that "the blankets and pillow are not necessarily laundered before each reissuing" (January 8, 1976 Quinlan Aff., ¶ 9; Quinlan 710). Mattresses were usually without covers because they had been removed by inmates who found the plastic uncomfortable (Quinlan 710). Mattresses were often filthy, deteriorated and foul smelling, and were stored without any sanitary precautions in a dirty supply room in the Jail basement (Swiderek 35-36; Pl. Ex. 7; Pl. Ex. 43, ¶ IX (1)). The same was true of the pillows, which were sometimes ripped and soiled and lacking pillow cases (Swiderek 36-37, 121; Pl. Exs. 8, 9). An inmate might or might not receive soap, a toothbrush and toothpaste upon admission (Dvorocsik 154; Rose 270; Walker 281).

The decontamination and bathing of inmates upon admission was the exception, not the rule (Dvorocsik 157; Rose 269; Walker 281). The Sheriff admitted that women inmates "were not decontaminated upon admission" (January 8, 1976 Quinlan Aff., ¶ 11; Quinlan 718). Inmates were scalded by water in showers which suddenly changed temperature (Walker 284; Rose 273).



The Jail did not conform to standards for inmate personal hygiene set forth in the Minimum Standards and "this failure was wilful." (113a; 419 F. Supp. at 801).

C. Health Services

1. The Jail Physician

The Stipulation provided that each inmate in continuous custody at the Jail for 14 days or more be examined by a physician, that medical files be established for each inmate, that adequate medical care and facilities be established and that medical care conform to the Minimum Standards (28a-29a). The medical care did not meet these standards.

The succession of Jail doctors received little guidance, support or respect from the Sheriff. Dr. Josephy, who served in that position from April 1975 through January 1976, was never informed that Jail health services were the subject of a Federal court order (Josephy 365, 368). He was never advised that he was required by State law and by the Stipulation to visit every inmate kept confined apart from other inmates for periods in excess of twenty-four hours. He never visited such inmates. (32a; Josephy 385).

When Dr. Josephy was unavailable, inmates did not always have regular visits from a substitute physician. The inmates sometimes went for several weeks without a visit

from a physician. (Swiderek 68; Dvorocsik 171-173; 180-181).

The Jail physician, newly-appointed as of the contempt hearing, appeared to have been given only a cursory description of his duties (Quinlan 721, 731). He was not told of the 1973 Stipulation and Order (Quinlan 732).

There were no regular physical examinations by a doctor. Instead, a registered nurse who visited the Jail one evening each week took a medical history from each new inmate. (Peluso 416, 419). The nurse never met Dr. Josephy and there was no communication between them (Peluso 418; Josephy 384). The nurse was never shown or told of the 1973 Stipulation and Order (Peluso 418-419).

## 2. The Medical Officer

The medical officer of the Jail routinely ordered, stored and distributed medications without consulting a pharmacist or anyone trained in the handling and use of drugs (Schoonmaker 230, 237-238, 240-241). Prescriptions by the Jail physician did not always indicate an end date (Schoonmaker 253). Although the medical officer once suggested to the Jail administration that a perpetual inventory of drugs be maintained, this was not done (Schoonmaker 231-232).

Medications were stored in an area described by the Health Department as "completely disorganized, overcrowded and generally dirty" (Pl. Ex. 43, ¶ VII). Because



there was no inventory kept, drugs were taken without knowledge of the medical officer (Schoonmaker 232, 236).

Medication trays were often accessible to persons who had no proper role in storing or dispensing that medication. (Schoonmaker 240-243, 252; Pl. Ex. 27, Nov. 22, 1975 entry 10:50). Inmates were sometimes denied or not given proper medication, including inmates in withdrawal. (Schoonmaker 244, Pl. Ex. 27, Dec. 4, 1975 entry 8:50, Aug. 24, 1975 entry #3, Sept. 1, 1975 entry #6, Dec. 4, 1975 entry 8:50, Nov. 22, 1975 entry 4:05; Pl. Ex. 28, Dec. 21, 1975 entry p. 19).

### 3. Treatment Facilities

The Jail physician examined inmates in a very small, sometimes not very clean, room in the Jail (Josephy 380; Schoonmaker 245-246). The Sheriff conceded that the room was inadequate (Quinlan 679). There was nearly no treatment provided within the Jail. There were no facilities for injections other than those provided to diabetics. (Josephy 380-382).

The women inmates were visited by Dr. Josephy no more than once each week. There was no examination room for women and no examining table which would permit a basic gynecological examination, even though frequently there were pregnant women held at the Jail (Josephy 382-383).

The heavy dependence placed on the use of medical clinics within the community made crucial the availability of transportation. Sheriff's Department staff and vehicles were often not available to transport inmates to hospitals and clinics. It was not uncommon for an inmate to miss a clinic appointment for lack of transportation. Sometimes it took another month before a new appointment could be arranged. (Schoonmaker 254-255).

The effect of inadequate treatment facilities was paralleled by the improper maintenance of lifesaving devices and the lack of staff skilled in using them. The resuscitator was kept three floors away from the inmates with serious medical and emotional problems (Quinlan 748, 752; Schoonmaker 250). There was no training program for the use of such equipment by the staff. (Schoonmaker 228; Swiderek 81). Fire extinguishers were improperly maintained, and staff members had difficulty in locating them (Pl. Ex. 23, pp. 11-12; Pl. Ex. 27, Aug. 20, 1975 entry #3; Jan. 13, 1976 entry 5:30 P.M.). There was no effective program of training procedures for evacuating cell blocks in case of fire and for dealing with other emergencies. (Swiderek 82-84; Pl. Ex. 37, ¶ VI(7); Pl. Ex. 43, ¶ VIII; Ex. 21, p. 9).

The lack of proper medical training and facilities caused great suffering (Dvorocsik 185-188; Pl. Ex. 27,



August 23, 1975 entry #5). Several months before the contempt hearing an inmate had a seizure. The guard on duty notified his superiors three times and never received a response (Pl. Ex. 28, Sept. 3, 1975 entry p. 7). In March 1975, two inmates committed suicide by hanging. No attempt was made to revive them, and they were left hanging from the cell bars (Pl. Ex. 20, p. 9; Pl. Ex. 21, p. 9).

#### 4. The Drug Problem

It was commonly acknowledged, even by the Sheriff, that inmates abused drugs. (Josephy 389; Pl. Ex. 36). Inmates who were not officially receiving medication would sometimes seem drugged. They would walk into walls, have great difficulty rising from a sitting position and be unable to talk (Schoonmaker 244). Inmates were drugwise and commonly asked the Jail physician for specific drugs (Redmond 334; Josephy 387).

There was no reliable procedure for insuring that each inmate properly consumed the drugs given him. (Schoonmaker 230, 243-246, 251-252). One inmate who wanted to discontinue a Valium prescription was told that that would not be possible and that he would have to refuse the medication daily. The inmate could therefore accept and store the tranquilizers for later abuse or exchange. (Dvorocsik 184).

One month before the contempt hearing, Dylantin was

given by Jail personnel to epileptic inmates without supervision and Darvon was being used by unknown persons without the regular storage, prescription and distribution routine being followed. Those drugs were kept unlocked in the admissions office. (Swiderek 68-72). There was no way of knowing to what extent medications were abused and misdirected (Schoonmaker 232, 243-244, 252-254).

Thirty to fifty percent of the inmate population received sleep medication from Dr. Josephy to deal with the most common inmate complaint -- insomnia. About the same percentage of inmates received tranquilizers. (Josephy 387-388).

#### 5. Dental Care

As of the date of the contempt hearing Dr. Burto Katz had been providing dental care to inmates at the Jail for approximately five years (Katz 593). He provided a dentist's chair, a spotlight and dental instruments at his own expense (Katz 597-598). Dr. Katz originally screened inmates at the Jail, but his weekly visits ended in November 1974 after notification from the Chief Jailer that there were insufficient funds for that purpose (Katz 599, 601-602, 606-607). Thereafter, inmates sometimes appeared at the dentist's office needing no dental care at all (Katz 609-610). At the same time there were inmates with dental



problems who were unable to see the dentist or who had to wait a long time to do so (Schoonmaker 256).

Dr. Katz's requests for authorization to perform costly dental procedures were sometimes ignored (Katz 610-613). In one instance Dr. Katz had to keep an inmate medicated and out of pain until the Jail administration would act on a request for authorization, a request that as of the contempt hearing had been pending for six months. (Walker 294-296, 301; Katz 614-615).

Dr. Katz heard that there was a court order with respect to dental care, but he "never knew the full extent of it or the implication of it." (Katz 603). No one from the Sheriff's Department ever approached him about improving the dental care at the Jail (Katz 619).

#### 6. Mental Health Services

In May 1975 the Sheriff rejected Dr. Josephy's recommendation that the inmates have the services of a psychologist or social worker (Josephy 366-367, 390). In July 1975 the Corrections Commission directed the Sheriff to secure the services of a professional social worker from the Dutchess County Department of Mental Hygiene (Pl. Ex. 18, ¶ 19). In August 1975 the Sheriff stated that a social worker had been visiting the Jail, but a check of the visitors' log and conversations with officers assigned to the admissions area failed to corroborate the Sheriff's claim. (Swiderek

62-65; Pl. Ex. 23, p. 17). The Sheriff failed to engage the services of any mental health professional. (Swiderek 65-66; Pl. Ex. 23, p. 17; Pl. Ex. 24, p. 11).

In January 1975 the Director of Clinical Services of the Dutchess County Department of Mental Hygiene wrote to the Sheriff and offered to train deputies in the handling of disturbed psychiatric patients (Pl. Ex. 45). The Department also offered a full range of mental hygiene services, including the assistance of a psychiatrist and a psychiatric social worker. The Department anticipated providing twenty to forty hours of services to the Jail weekly, including emergency service, at no cost to the Sheriff's Department. (Newman 352-355; Pl. Ex. 48). The Sheriff's Department was informed through the Chief Jailer that the Department of Mental Hygiene was then prepared to provide such services at the Jail as well as the Department's facility in Poughkeepsie (Newman 354).

All the Sheriff had to do to obtain these services was to request them. Instead, inmates referred by the Jail physician or other Jail staff -- only about twenty inmates over the course of one year -- were seen at the Mental Health Center (Newman 352-353).

#### 7. The Health Department

The Sheriff never contacted the Dutchess County Health Department for the purpose of arranging kitchen



inspections, sanitary inspections or evaluations and assistance in improving medical and mental health care at the Jail. On his own initiative, Dr. Redmond, Commissioner of the Health Department, visited the Jail in December 1973 (Redmond 311; Pl. Ex. 30). Also on his initiative he arranged for two kitchen inspections at the Jail, one in January and one in March 1974 (Redmond 311-313; Pl. Exs. 31, 32). These inspections, each of which was made by Health Department sanitarians and on notice to the Sheriff's Department, revealed violations relating to cleanliness, food handling and structural problems (Redmond 314; Pl. Exs. 31, 32).

Dr. Redmond was never informed that the Stipulation and Order required the Sheriff to bring the Health Department into the Jail for the purpose of inspecting the kitchen and food service facilities and workers (Redmond 315). During his December 1973 visit at the Jail Dr. Redmond volunteered to the Sheriff that the Health Department could inspect the Jail on a regular basis, but the Sheriff did not follow up on the offer (Redmond 315-316).

Dr. Redmond visited the Jail in early December 1974 and issued a report on Jail medical services (Redmond 319-322; Pl. Ex. 41). A comparison of that report with the evidence adduced by plaintiffs on the contempt motion demonstrates that there was no significant change in the nature

and quality of health care in the year since Dr. Redmond's report was issued. Although the Sheriff was provided with a copy of the report, Dr. Redmond was still not apprised of the existence or the contents of the Stipulation and Order (Redmond 321). The Sheriff never contacted the Health Department. He never approached Dr. Redmond about improving medical care or sanitation at the Jail. (Pl. Ex. 36; Redmond 330-331, 337-338, 343).

In August 1975 the Health Department, on its own initiative, conducted its first full sanitary inspection at the Jail (Redmond 338-339). That inspection revealed a number of violations, some structural, but most relating to lack of maintenance and use of improper procedures both in the kitchen and throughout the Jail (Pl. Ex. 37). Dr. Redmond, in his cover letter to the Sheriff enclosing the inspection report, observed that the report contained suggestions "which if implemented could bring the Jail into an acceptable condition for institutions" (Pl. Ex. 37). Dr. Redmond offered the inspection and advisory services of his Department and told the Sheriff that "with a minimal expenditure of funds many of the items listed could be corrected" (Pl. Ex. 37).

The only subsequent communication from the Sheriff was a perfunctory thank you a few days later (Pl. Ex. 38).



Between August 1975 and the contempt hearing the only activity or communication between the Health Department and the Sheriff's Department concerning the Jail was the January 1976 follow-up sanitary inspection and report (Redmond 340-342; Pl. Ex. 43). The report reflected little improvement since August 1975, even in those areas where little money was required to effect substantial improvements.

The District Court found that "the provisions of the stipulation with respect to inmate health services were continually and willfully violated. . . ." (114a; 419 F. Supp. at 802). The District Court took particular note of the fact that the Sheriff never even availed himself of the free mental health services offered by the Dutchess County Commissioner of Mental Hygiene. (114a-115a; 419 F. Supp. at 802).

The Court found emergency procedures at the Jail to be "woefully inadequate", the dental care was characterized as "less available since the 1973 Order" and "[t]here is a serious problem with drugs at the jail. . . ." (116a-117a; 419 F. Supp. at 803). The District Court also noted Dr. Redmond's testimony that the biggest obstacle which prevented the Health Department from making a significant contribution toward improving the jail facilities was the lack of cooperation from the Sheriff's office." (118a; 419 F. Supp. at 804).

D. Food

The Stipulation provided that the Jail kitchen meet minimum sanitation standards, that persons in the kitchen meet restaurant health requirements, that the kitchen be regularly inspected, that minimal nutritional standards be met for inmates who do not eat pork for religious reasons and that food services be maintained in conformity with the minimum standards (29a). None of these requirements was met.

The kitchen facilities and staffing and the food itself changed little since the first hearing of this case in 1973. The man in charge of the kitchen was not informed that the Stipulation and Order existed and applied to his responsibilities (Hesselbach 472). Health Department and Corrections Commission reports since 1974 showed that problems relating to the storage and preparation of food persisted and that the personnel working in the kitchen were not properly screened to avoid health threats to the inmate population (Pl. Exs. 32, 33; Pl. Ex. 37, ¶¶ I, II, III; Pl. Ex. 43, ¶¶ I, II, III; Pl. Ex. 23, pp. 8, 10; Pl. Ex. 24, pp. 6, 8).

There were no regular bathing and washing procedures in effect for kitchen staff. Mr. Hesselbach, the supervisor of the kitchen, relied upon inmate kitchen workers to shower in their housing areas before working in



the kitchen. (Hesselbach 491-493). There was no procedure for ensuring that kitchen workers would wear proper uniforms or use clean towels (Hesselbach 489-491, 493-494).

Dr. Josephy was asked to perform physical examinations of inmates working in the kitchen, but he was not informed that such examinations were required by the Stipulation and Order (Josephy 376-377, 379-380). One month before the contempt hearing four of nine inmate kitchen workers were not medically certified (Swiderek 92-93). Dr. Josephy was never told to perform examinations on non-inmate kitchen workers, though such examinations were required by the Stipulation as well as by Corrections Commission directive (Josephy 379-380; Swiderek 88-90, 93-94; Pl. Ex. 19, ¶ 12). The new Jail physician had performed examinations on some kitchen workers -- guards as well as inmates -- although the examination of guards was cursory and took place in the food storage area near the kitchen (Hesselbach 477-479, 486-487).

As of the contempt hearing there was still no regular monthly examination of kitchen workers (Swiderek 93-94; Hesselbach 482; Pl. Ex. 23, pp. 10-11; Pl. Ex. 24, p. 8). There was no examination of kitchen workers who "don't work with the food." (Hesselbach 479, 483-484; Quinlan Aff., ¶ 23). Mr. Hesselbach, the kitchen supervisor, was not examined by the Jail physician. He was seeing a doctor

and taking a daily antibiotic because he tested positive for tuberculosis (Hesselbach 487-488).

Inmates with special dietary needs had difficulty meeting them. One inmate was a vegetarian and had had to resort to the Jail physician in order to get milk, fruit and a simple protein substitute such as peanut butter (Walker 289-290, 304-305). An inmate who was aggressive and well-connected could improve the quality, quantity and timing of his meals over that which was offered to other inmates (Dvorocsik 162-164).

The District Court found "an utter and wilful failure to comply" with the terms of the Stipulation and the provisions of the Minimum Standards incorporated by reference with respect to food (119a; 419 F. Supp. at 804).

#### E. Recreation

The Stipulation provided that an outdoor recreation area was to become operational within six months of the date of the Stipulation and Order (30a). Although an outdoor recreation area was built, it was available to inmates only when the temperature was over 50 degrees. As of the February 1976 contempt hearing, the last time an inmate had outdoor recreation was October 1975, and there was no prospect for outdoor recreation until the spring. (Vincent 576). This was so in spite of the fact that there



were jackets in various sizes available to inmates who wished to go outside (Quinlan 753).

Senior Jail Administrator Vincent felt that outdoor recreation was unnecessary because inmates were too lazy to go outside in any season. Mr. Vincent felt, too, that there would be no interest in a vocational training program in spite of the fact that there was an on-going educational program conducted by Project Gateway (Vincent 578). In Mr. Vincent's mind an inmate was getting recreation when he went to court (Vincent 576). The Sheriff believed that inmates should be kept indoors during cold weather because of the risk of catching cold outdoors (Quinlan 754).

As of the time of the contempt hearing there was still no area provided for physical exercise within the Jail (Quinlan 751-752; Walker 286; Dvorocsik 166-167; Vincent 543, 576). All an inmate could do was read, sleep, watch television and talk (Walker 285, 293; Dvorocsik 169, 191). Poor lighting made reading difficult, especially after sunset (Rose 277-278; Walker 293). There was no place within the Jail for recreation (Dvorocsik 190-191; Walker 285-286). There were few regular educational programs and no vocational programs (Vincent 578; Dvorocsik 190).

The District Court found these conditions to be a "wilful violation of the requirements of the Stipulation." (120a; 419 F. Supp. at 805).

F. Communication

The Stipulation provided that stationery for inmate correspondence state restrictions on correspondence. Sentenced inmates could be restricted in their correspondence; unsentenced inmates could not. Incoming mail could be censored by designated Jail personnel for the sole purpose of protecting the security of the Jail. Inmates were allowed to telephone counsel on arrival at the Jail and were permitted as many calls as necessary thereafter to obtain counsel. Communication was to be regulated in conformity with the Minimum Standards. (30a-31a). The Sheriff failed to comply with these provisions.

Mail did not leave the Jail on a regular basis, resulting in substantial delays (Pl. Ex. 23, pp. 20-21; Pl. Ex. 24, p. 14; Rose 273; Walker 297). Inmate mail was lost within the Jail (Pl. Ex. 28, Aug. 13, 1975 entry; Pl. Ex. 27, Aug. 18, 1975 entry #6). Attorney-client mail was interfered with (Dvorocsik 191-192). There were virtually no rules and regulations for inmates or guards which described the kind of mail allowed, how many letters could be sent and received and restrictions as to persons with whom an inmate



might correspond (Quinlan 760).

There were no clear regulations regarding telephone calls. Inmates were sometimes admitted to the Jail and not allowed to make a phone call. Some were not informed of their right to do so (Dvorocsik 150-151; Walker 282; Pl. Ex. 27, Dec. 8, 1975 entry). The schedule for the making of phone calls was not always followed (Walker 297-298). As with other items and services available at the Jail, access to the telephone varied among inmates and depended upon the discretion of the guards (Dvorocsik 192-193; Walker 303-304). Telephone calls were not always permitted in places where privacy was possible (Vincent 565; Walker 302-304).

The District Court found that "[n]one of these violations can be attributed to a lack of funds; rather, they are simply willful violations of the stipulation." (121a; 419 F. Supp. at 805).

G. Reading Materials

Under the Stipulation inmates were allowed to receive any literature, except that Jail personnel could censor literature which threatened Jail security. The literature censored was to be identified to the inmate in writing, kept in a safe place and given to the inmate on his release. (31a).

There were, however, no standards, written or unwritten, which described limitations on reading materials

allowed into the Jail (Swiderek 105). The only apparent consideration was whether certain material was pornographic, and that determination was made by the Sheriff according to his own unarticulated standards (Quinlan 758-761; Swiderek 106).

The District Court viewed this as "another willful violation of the terms of the Stipulation." (122a; 419 F. Supp. at 806).

#### H. Supervision and Discipline

The Stipulation required that inmates who were kept apart from other inmates for disciplinary reasons were to be examined by a physician if the confinement exceeded twenty-four hours. They were to be provided with adequate sanitary conditions and sufficient food. Inmates whose mental or physical condition or vulnerability to other inmates required that they be segregated were to be constantly supervised or removed to a facility where proper supervision was available. Discipline, security and supervisory visits were to be conducted in conformity with the Minimum Standards and State law. (32a-33a). The staff failed to comply with these provisions.

Inmates were often kept in their cells for continuous periods in excess of twenty-four hours (Walker 298-299; Dvorocsik 179-180; Smith 360). Yet the Jail physician never visited such inmates (Josephy 385; Walker 299; Dvorocsik 180-181; Smith 360), and the Sheriff did not file weekly reports with the Corrections Commission describing the



treatment and the condition of these people (Swiderek 100-101).

Just before the contempt hearing, sections of the Jail were designated for the housing and observation of inmates who were sick or violent or subject to violence from others. (Swiderek 24, 116, 119). Several weeks prior to that, however, inmates who were supposed to be kept under constant observation were frequently left unattended (Pl. Ex. 27, Dec. 7, 1975 entry (\*), Dec. 8, 1975 entry 8:20). This was also true of inmates who were ill or subject to seizures during which they might injure themselves (Dvorocsik 185-188). There was virtually no procedure at the time of admission for separating such inmates from the general inmate population (Swiderek 23-24, 136). An inmate who was transferred from the general Jail population to the "bird cage", an isolation cell, attempted suicide by cutting his wrists with scissors he found in the cell (Pl. Ex. 28, Dec. 13, 1975 entry 5 A.M. p. 16).

Although inmate rules and regulations were promulgated and at times posted and distributed, most inmates never heard of much less received or saw a copy of the rules and regulations (Dvorocsik 151, 170, 176; Rose 270; Walker 282; Swiderek 94-97). The most recent version of the rules and regulations in some instances did not reflect actual practice and were in some respects contrary to law (100a).

The procedure for making rounds and otherwise supervising inmates was inadequate. No proper record was kept of individuals coming and going from the various tiers (Vincent 558-559). The Jail's own rules for the security of each floor were not regularly followed (Vincent 559; Quinlan 707; Def. Ex. 0). The closed circuit television system, which afforded a view of the "exercise corridor" on some of the floors, was inoperative for several months prior to the contempt hearing (Swiderek 105). It was common for entire floors to be unsupervised and for three or four men to be supervising the entire Jail (Pl. Ex. 27, Aug. 18, 1975 entry #7, August 20, 1975 entry #1, August 24, 1975 entry #7, November 22, 1975 entry 12:00, December 4, 1972 entry 8:00, December 7, 1975 entry (\*), December 8, 1975 entries, January 13, 1 entry 4 P.M., February 1, 1976 entries 8:00, 8:30 A.M.). Problems of staffing and supervision were aggravated by the fact that some inmates enjoyed nearly complete freedom to roam through the facility (Pl. Ex. 24, p. 13; Pl. Ex. 27, December 8, 1975; Dvorocsik 168-169).

The handbook supposedly distributed to Jail guards did not mention the Stipulation and Order and in some respects was contrary to law (Pl. Ex. 22). The Sheriff testified that the handbook might not have been revised within the last five years (Quinlan 746), although he testified at the preliminary injunction hearing before the District Court on



July 2, 1973 that he was then in the process of redrafting it. At the July 1973 hearing the Sheriff conceded that the handbook could have been five years old even then. (1973 Hearing Transcript at 10-14, 37-38). These facts contradicted the Sheriff's statement that "[a]ll Jail personnel are provided with a Jail handbook containing rules and regulations for operating procedures in compliance with the Court Order." (January 8, 1976 Quinlan Aff., ¶ 36).

The District Court found that these conditions reflected a failure to comply with the section of the Stipulation dealing with supervision and discipline (123a; 419 F. Supp. at 806) (32a).

I. Alterations and Repairs to Physical Plant

The Stipulation provided that cells were to be provided with sufficient lighting and adequate heating, ventilation and plumbing (33a). Although the Sheriff knew that the Stipulation required the installation of lighting in cells, he believed at the time the Stipulation was signed that the Corrections Commission would not approve light fixtures in cells (Quinlan 762-764). He testified that in any event such fixtures were too costly and that the failure of the County Legislature to appropriate funds for the general renovation of the Jail somehow excused his non-compliance with this provision (January 8, 1976 Quinlan Aff., ¶ 37). The Sheriff made no effort to obtain an

appropriation for cell lighting. He retained a contracting firm which did not approve of such lighting (Keene 528).

Had the Sheriff made inquiry even of that contracting firm, he would have discovered that such lighting could be obtained (Keene 526). Had the Sheriff seriously attempted to study the matter, he would have asked the firm for a price quotation, as he did with certain other matters (e.g., Def. Ex. F.; Keene 531). Unbreakable fixtures were obtainable for the interiors of cells (Keene 526). Had the Sheriff made inquiry of the Corrections Commission, he would have learned that such fixtures were in use in state and county correctional facilities and jails as well as in village keeps and lock-ups throughout New York State and were approved by the Corrections Commission (Swiderek 104). The Sheriff took none of these steps.

The heating system at the Jail was extremely difficult to control and created extremes of temperature that were uncomfortable and unhealthy (Dvorocsik 156-157; Walker 299; Quinlan 755). Little was done to compensate for this structural infirmity. A newly admitted inmate might get no clothing or blanket at all. (See p. 15, supra).

Minimal cleanliness was not maintained at the Jail. The facility was not cleaned on a regular schedule (Dvorocsik



174, 184, 193; Rose 278-279; Walker 283, 300; Swiderek 53-60; Pl. Ex. 23, pp. 7-8; Pl. Ex. 24, pp. 6-7; Pl. Ex. 37, ¶ VI(3); Pl. Ex. 43, ¶ VI(3)). Inmates requested cleaning implements with no result and finally resorted to taking brushes from the kitchen (Rose 279; Walker 283). Within each section the implements necessary for cleaning both common areas and individual cells were often in the control of inmates who made such implements available to other inmates on an unequal basis (Dvorocsik 175). There was no requirement that cells be cleaned at any time by anyone (Swiderek 59, 60). Health Department reports noted urine on tier walls and floors and an accumulation of excrement on toilet facilities. (Pl. Ex. 27, August 18, 1975 entry #4; Pl. Ex. 37 ¶ VI(3); Pl. Ex. 43, ¶ VI(3)).

This lack of sanitation extended to the kitchen, where garbage was allowed to remain while food was prepared (Hesselbach 496). Food implements were unclean. The kitchen was infested with rodents and insects (Swiderek 86-87, 91-92; Rose 278; Dvorocsik 193-194; Pl. Ex. 23, p. 8; Pl. Ex. 24, p. 6; Pl. Ex. 27, August 18, 1975 entry #3; Pl. Ex. 37, ¶¶ I, II, III, VI(4); Pl. Ex. 43; ¶¶ I, III, VI(4), VI(5)).

There was no ventilation system, except that in the summer fans were sometimes placed on the tiers. They provided little relief. (Pl. Ex. 37, ¶ VI; Pl. Ex. 43, ¶ VI). There was no ventilation of showers, which photographs

showed to be badly deteriorated and filthy (Pl. Exs. 10-11, 15-16). Paint quickly peeled off the shower walls, causing rust to form and there was no proper cleaning and maintenance (Swiderek 27-28, 39-40, 43). The condition of the showers and bathroom facilities showed no change in the two most recent sanitary inspections by the Dutchess County Health Department (Pl. Ex. 37, §§ V, VI(1), VI(2); Pl. Ex. 43, §§ VI(1), VI(2)). Other fixtures, such as wash basins, were in a similar condition (Swiderek 42; Pl. Ex. 14; Rose 272, 274).

The plumbing at the Jail was inadequate. Inmates had been made to occupy cells with non-functioning plumbing (Dvorocsik 179-180; Walker 300; Rose 273-274). Water collected in shower stalls and became stagnant (Swiderek 28, 127). An inspection by the Corrections Commission just prior to the contempt hearing revealed that certain showers did not function and one shower leaked down into the corridors from the third to the second to the first floor (Swiderek 46).

Here, as with many other matters relating to sanitation, health and comfort, the Sheriff rested on his alleged inability to secure funds for a "renovation" (January 8, 1976 Quinlan Aff., ¶ 38). But as the County Health Department and Corrections Commission inspection reports and testimony demonstrated, routine and inexpensive maintenance would eliminate unsafe and annoying conditions.



The Sheriff noted that "a complete overhaul of the plumbing is financially impossible with the present budget" (January 8, 1976 Quinlan Aff., ¶ 10). The suggestion that a complete overhaul of the plumbing was required in order to make the showers clean was characteristic of the Sheriff's emphasis on capital expenditures when the immediate need was for services and maintenance, much of which could be accomplished at little expense by inmates who were properly trained and equipped. The Court agreed and found no excuse for these conditions (123a-126a; 419 F. Supp. at 806-807).

J. Implementation

The Stipulation required that the Sheriff submit a plan within thirty days for compliance with the provisions regarding health services, recreation and alterations and repairs to the physical plant (33a).

The Sheriff stated that he had never been requested to submit for District Court approval a plan for implementation as required by the Stipulation (January 8, 1976 Quinlan Aff., ¶ 40). The Sheriff defended his inaction in the District Court by blaming his own attorney for not adequately advising him. The Sheriff presses the same argument on appeal (Defendant-Appellant's Brief at 37).

The exhibits introduced at the hearing showed that

the Sheriff was fully aware of his obligations. Five weeks after the Stipulation was signed, plaintiffs' counsel wrote to the Sheriff's counsel inquiring about the posting and distributing of rules and regulations (42a). After further correspondence, plaintiffs' counsel wrote a letter to the Sheriff's counsel in February 1974 stating in clear and certain language that the Stipulation had not been complied with and that there was doubt as to the Sheriff's intention to comply (46a-47a). The letter noted plaintiffs' intention

"to make a motion to hold Sheriff Quinlan in contempt of Court, seeking a fine, imprisonment and attorneys' fees. . . . "

That letter was forwarded to the Sheriff by his counsel (45a).

The District Court emphatically rejected the Sheriff's assertion that he was not aware of his obligation to implement the provisions in the Stipulation (124a-126a; 419 F. Supp. at 807).



## ARGUMENT

### POINT I

THE DISTRICT COURT'S FINDING  
THAT THE SHERIFF WILFULLY  
FAILED TO COMPLY WITH THE  
1973 STIPULATION AND ORDER WAS  
BASED UPON EVIDENCE THAT WAS  
CLEAR AND CONVINCING

Although the only proper issue on this appeal is whether the District Court's contempt finding was clearly erroneous, Fed. R. Civ. P. 52(a), the Sheriff has attempted to turn this appeal into an attack on the underlying order which he wilfully violated. As this Court stated, in reviewing a contempt proceeding based on allegation of violation of a consent decree in a patent infringement case:

"The validity of the patent is not before this court, for the consent decree made that question res judicata for the purposes of this appeal [citations omitted]. It may be that consent to the decree was improvidently given, but the only issue which this court may determine is whether the district court's declining to find the defendant guilty of civil contempt for violation of the injunction in the consent decree was clearly erroneous." Hopp Press, Inc. v. Joseph Freeman & Co., Inc., 323 F.2d 636, 637 (2d Cir. 1963) (emphasis supplied). Accord, Desagnat v. Dratler, 142 F.2d 845, 846 (2d Cir. 1944).

The District Court's Contempt  
Finding Was Based On Evidence  
That Was "Clear and Convincing"

Civil contempt must be established by evidence which is "clear and convincing". Hart Schaffner & Marx v. Alexander's

Dep't Stores, Inc., 341 F.2d 101, 102 (2d Cir. 1965);  
Stringfellow v. Haines, 309 F.2d 910, 912 (2d Cir. 1962);  
American Optical Co. v. Rayex Corp., 291 F. Supp. 502, 505  
(S.D.N.Y. 1967), aff'd, 394 F.2d 155 (2d Cir.), cert. denied,  
393 U.S. 835 (1968); Mitchell v. All-States Bus. Prod. Corp.,  
250 F. Supp. 403, 406 (E.D.N.Y. 1965). The testimony of  
plaintiffs' witnesses at the contempt hearing far exceeded  
this standard. That testimony was clear, articulate, largely  
uncontroverted and highly probable. See pp. 13-41, supra.

The District Court's Contempt  
Finding Decision Was Not  
Clearly Erroneous

The standard for appellate review of a contempt  
judgment is the same as the standard applicable to all  
actions where the facts are tried to the court. W. E. Bassett  
Co. v. Revlon, Inc., 435 F.2d 656, 662-663 (2d Cir. 1970);  
Hopp Press, Inc. v. Joseph Freeman & Co., Inc., 323 F.2d  
at 637; Artvale, Inc. v. Rugby Fabrics Corp., 303 F.2d 283,  
286 (2d Cir. 1962).

As set forth in Rule 52(a) of the Federal Rules  
of Civil Procedure:

" . . . findings of fact shall not be set  
aside unless clearly erroneous, and due  
regard shall be given to the opportunity  
of the trial court to judge of the cred-  
ibility of the witnesses. . . ."



As set forth at length in the Statement of Facts, above, the plaintiff presented to the District Court multiple instances of violations of the 1973 Stipulation and Order, each supported by a variety of testimony and exhibits. See pp. 13-41, supra.

Practically the only testimony elicited by the Sheriff to counter the plaintiff's proof was that of the Sheriff himself and Leon Vincent.\* The Sheriff failed to introduce significant rebuttal evidence, which would have been in his control had it existed. SEC v. Radio Hill Mines Co., Ltd., [1972-1973 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶93,785 at p. 93,413 (S.D.N.Y. 1973); Singer Mfg. Co. v. Sun Vacuum Stores, Inc., 192 F. Supp. 738, 740-741 (D.N.J. 1961).

Of course, conflicting testimony merely raises an issue of credibility. Crane v. Gas Screw Happy Pappy, 367 F.2d 771, 774-75 (7th Cir. 1966) cert. denied, 386 U.S. 959 (1967). The District Court was more than justified in resolving in plaintiffs' favor any conflict between the Sheriff's testimony and that of the plaintiffs' witnesses. The District Court

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\* Much of the testimony of witnesses for the Sheriff, such as Public Defender Brown, who testified that he got cooperation from the Sheriff, or that of Judge Baratta and Magistrate Garrity, the two character witnesses for the Sheriff, had no relevance to conditions in the Jail.

found the plaintiffs' evidence more credible. In fact the District Court's finding that the Sheriff had committed "a fraud on the Court" with respect to cell lighting and the District Court's rejection of the Sheriff's defense of ignorance are explicit findings that the Sheriff was not credible. (125a; 419 F. Supp. at 807).

The Sheriff admitted that he was in violation of the 1973 Stipulation Order - his defense was inability to comply (January 8, 1975 Quinlan Aff., ¶II). The Sheriff failed to meet his burden of proof on this defense.

"[A]lthough inability to comply with a judicial decree constitutes a defense to a charge of civil contempt, *United States v. Bryan*, 339 U.S. 323, 330-331, 70 S.Ct. 724, 94 L.Ed. 884 (1950), the federal rule is that one petitioning for an adjudication of civil contempt does not have the burden of showing that the respondent has the capacity to comply. *United States v. Fleischman*, 339 U.S. 349, 362-363, 70 S.Ct. 739, 94 L.Ed. 906 (1950); *Cutting v. Van Fleet*, 252 F. 100, 102 (9th Cir. 1918). The contrary burden is upon the respondent. To satisfy this burden the respondent must show 'categorically and in detail' why he is unable to comply. In *re Byrd Coal Co., Inc.*, 83 F.2d 256 (2d Cir. 1936). Since the Board did not have the burden of proof as to respondents' ability to comply, it was under no obligation to allege such ability in its petitions to this court." *NLRB v. Trans Ocean Export Packing, Inc.*, 473 F.2d 612, 616 (9th Cir. 1973) (emphasis supplied). Accord, *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 713 (D.C. Cir. 1975).

There is no evidence that the administrative reforms required by the Stipulation were not within the



Sheriff's power. There was no evidence that the Sheriff seriously attempted to make those reforms. There is no evidence that his budget did not provide the modest sums required to implement certain provisions of the Stipulation relating to physical plant. Nor does the evidence show that he made application to the County Legislature for such monies. The Sheriff did propose a \$2 million bond issue to be used to renovate the Jail, but the District Court did not deem this one very large application to excuse the Sheriff's failure to comply. The Sheriff specifically failed to accept free assistance offered by other County departments in the health and mental hygiene areas. The evidence was overwhelming that the Sheriff chose to ignore the 1973 Stipulation and Order.\* See, e.g., pp. 14, 22-25, 30, 33, 35-37, 39-41, supra.

Proof Of Civil Contempt Does  
Not Require A Showing Of Wilfulness

The sole question in a civil contempt proceeding is whether the defendant has complied with the court's order. A finding of wilfulness is not essential to a finding of civil contempt. The Supreme Court has so held.

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\* The Sheriff, of course, also had the obligation to petition the District Court for relief if he could not comply with its order. Regal Knitwear Co. v. NLRB, 324 U.S. 9, 15 (1945).

"The absence of wilfulness does not relieve from civil contempt. Civil as distinguished from criminal contempt is a sanction to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. See United States v. United Mine Workers, 330 U.S. 258, 303-304; Penfield Co. v. Securities & Exchange Commission, 330 U.S. 585, 590; Maggio v. Zeitz, 333 U.S. 56, 68. Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of mind of respondents. It laid on them a duty to obey specified provisions of the statute. An act does not cease to be a violation of a law and of a decree merely because it may have been done innocently. The force and vitality of judicial decrees derive from more robust sanctions." McComb v. Jacksonville Paper Co., 336 U.S. 187, 191 (1949). (Emphasis supplied.)

In Landman v. Royster, 354 F. Supp. 1292 (E.D. Va. 1973), a contempt proceeding against prison officials, the defendants were held in contempt despite the determination by the court that their noncompliance was more likely the result of negligence than wilfulness.

"The violations most likely resulted from carelessness and perhaps a failure to realize fully the gravity of the Court's order. Such an attitude stemmed no doubt from the long-held conception of prison administrators, noted previously, that their discretion over their charges is so great that they could not be held accountable for their actions to any outside body." Id. at 1301.

The Sheriff's noncompliance was proved beyond doubt in the District Court, and indeed it is so conceded on appeal (Defendant-Appellant's Brief at 34).



Judge Gurfein's Order Of July 30,  
1973 Does Not Require A Showing  
Of Wilfulness

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On July 30, 1973 Judge Gurfein, then a Judge of the District Court, issued an opinion and order in which he approved the Stipulation between parties (80a). Accordingly, the action was dismissed upon the filing of the Stipulation, "subject to reopening or the institution of contempt proceedings in the event of a wilful failure to comply with the aforementioned order of the Court." (82a).

The Sheriff contends that the above language in Judge Gurfein's Order makes wilfulness a necessary element in proving the Sheriff's contempt. Both the law on relief and the facts of this case indicate that Judge Gurfein could not have so limited the relief otherwise available to plaintiffs and, indeed, that he did not intend such a result.

Judge Gurfein's concern with conditions at the Dutchess County Jail was reflected in his appointment of counsel to represent the pro se plaintiffs, in the holding of an evidentiary hearing and by his personal inspection of the Jail (81a-82a). Judge Gurfein suggested that the parties try to agree on improvements in Jail conditions and

approved the Stipulation in which the Sheriff agreed to make those improvements. There is nothing in the record to support a finding that Judge Gurfein intended in any way to narrow the relief available to enforce the Stipulation and Order.

A court may not limit relief which is otherwise afforded by statute or inherent in the judicial power. As the Supreme Court noted in McComb v. Jacksonville Paper Co., 336 U.S. at 191, 193:

" . . . the grant or withholding of remedial relief is not wholly discretionary with the judge, as Mr. Justice Brandeis wrote for a unanimous Court in Union Tool Co. v. Wilson, 259 U.S. 107, 111-112. The private or public rights that the decree sought to protect are an important measure of the remedy.

\* \* \* \* \*

" . . . We are dealing here with the power of a court to grant relief that is necessary to effect compliance with its decree. The measure of the court's power in civil contempt proceedings is determined by the requirements of full remedial relief." (Emphasis supplied.)

The inherent power of a court to grant full remedial relief to enforce contempt of its order or decree has been recognized in numerous decisions. See First Secur. Nat. Bank & Trust Co. v. United States, 382 U.S. 34, 35 (1965); Union Tool Co. v. Wilson, 259 U.S. 107,



111-112 (1922); United States Steel Corp. v. United Mineworkers, 393 F. Supp. 942, 947 (W.D. Pa. 1975); Universal Athletic Sales Co. v. Salkeld, 376 F. Supp. 514, 518 (W.D. Pa. 1974), vacated on other grounds, 511 F.2d 904 (3rd Cir.) cert. denied, 423 U.S. 863 (1975); In re Williams, 306 F. Supp. 617, 619 (D. Col. 1969).

The District Court's finding of contempt was a step toward the relief which plaintiffs mistakenly believed they had received from the Sheriff in 1973. Even though wilfulness was not a necessary element of the contempt finding, the District Court nevertheless found throughout that the Sheriff's noncompliance was consistently wilful.

" . . . [W]ith respect to most of the items which are involved in this hearing, the Sheriff is in willful contempt." (125a; 419 F. Supp. at 807).

Therefore, the contempt finding should be affirmed even if this Court accepts the Sheriff's interpretation of the 1973 Order, as requiring proof of wilfulness.

## POINT II

### THE COUNTY OF DUTCHESS WAS NOT AN INDISPENSABLE PARTY TO THIS ACTION

The Sheriff's argument that the District Court lacked jurisdiction over this action because of the failure to join an indispensable party - the County of Dutchess - is merely a different version of his defense that he was unable to comply with the 1973 Stipulation and Order. The same facts which led the District Court to reject that defense mandate rejection of this argument.\*

Rule 19(a) of the Federal Rules of Civil Procedure provides that a person subject to service without depriving the court of jurisdiction shall be joined as a party in an action if in his absence complete relief cannot be accorded among those already parties. The Sheriff argued that the commitments made in the 1973 Stipulation

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\* The Sheriff also argues that the Court lacked jurisdiction to "order" the Stipulation because there was no specific finding of unconstitutionality. (Defendant-Appellant's Brief at 48-50.) Presumably, it was to avoid such a finding that the Sheriff "settled" the action in 1973. In any event the propriety of the Stipulation and Order is not an issue on the appeal of this contempt finding. Hopp Press, Inc. v. Joseph Freeman & Co., Inc., 323 F.2d at 637.



and Order could not be fulfilled without the presence of the County.

However, under New York law, operation of the Dutchess County Jail is the responsibility of the Sheriff, for whose acts the County is not responsible. N. Y. Correction Law § 500-c (McKinney 1976 Supp.); N. Y. Const. Art. 13, § 13 (McKinney 1969). The "Minimum Standards" promulgated by the Corrections Commission and incorporated by reference into the Stipulation imposed upon the Sheriff, and no one else, the duty to provide many of the services and follow the procedures which the Sheriff further agreed to implement in the settlement of this action (7 N.Y.C.R.R. § 5100 et seq.; 83a-99a). In effect, the Sheriff argues that his own wilful failure to comply retrospectively demonstrates that complete relief could not be accorded from him alone and that, again retrospectively, the County of Dutchess should have been a party. That argument is a cynical distortion of the law.

Rule 19(a) of the Federal Rules of Civil Procedure provides in part:

"Persons to be Joined if Feasible. A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief

cannot be accorded among those already parties, or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest."

This equitable rule requires that all persons necessary to a just adjudication ought to be brought before the court, if feasible. See, e.g., Hart v. Community School Bd. of Brooklyn, N.Y. School Dist. 21, 383 F. Supp. 699 (E.D.N.Y. 1971), aff'd, 512 F.2d 37 (2d Cir. 1975). This is a determination which turns peculiarly upon the facts of each case. 7 Wright and Miller, Federal Practice and Procedure, § 1604, at 35 (1972).

In the instant case, there is no question of feasibility since the County of Dutchess, the Dutchess County Executive and the Dutchess County Legislature (the "County defendants") are subject to service of process. Their joinder would not have deprived the District Court of jurisdiction, nor would venue have been improper.\* Fed. R. Civ. P. 19(a).

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\* As there was no procedural obstacle to joinder of the County defendants, Rule 19(b) does not apply and the Sheriff's discussion of Rule 19(b) is not pertinent and misleading.



The only question raised by the Sheriff is whether complete relief could be accorded with him as the only defendant. See, e.g., Resident Participation of Denver, Inc. v. Love, 322 F. Supp. 1100, 1108 (D. Col. 1971).

The evidence below removes from the realm of fair dispute the question of whether the Sheriff had the power to comply with the 1972 Stipulation and Order. He did have that power, and the District Court so found.

The Sheriff's argument is reduced to this: since complete relief cannot be granted to the prisoners in the absence of the County, I need not comply with a court order and with my own agreement granting them relief. To accept this argument would be to make a mockery of the judicial process.

A similar argument was advanced in Gates v. Collier, 501 F.2d 1291 (5th Cir. 1974), an appeal by the Superintendent of the Mississippi State Penitentiary, members of the Mississippi Penitentiary Board and the Governor of the State of Mississippi challenging the nature and extent of equitable relief granted by the district court requiring major physical renovations and administrative reforms at the Mississippi State Penitentiary. The appellants in Gates argued, inter alia, as does the Sheriff here, that

"the state legislature is a necessary party,

because none of the named parties defendant can adequately carry out the nature of the relief exacted which requires expending of substantial funds which only the legislature can appropriate . . . ." Id. at 1319.

The court rejected this argument. Accord, Welsch v. Likins, Dkt. Nos. 76-1473, 76-1797, Slip. Op. at 21, 23 (8th Cir., March 9, 1977).

Of course, Gates was a case in which substantial funding was necessary to accord complete relief. Gates v. Collier, 501 F.2d at 1319. This is not such a case. However, Gates stands for the proposition that even if this were a case in which implementation of the 1973 Stipulation and Order required legislative or executive action, that would neither excuse the Sheriff's noncompliance nor make the legislature or the executive a necessary or indispensable party to this action. At the very least, the Sheriff would have to demonstrate -- and the District Court has found that he has not so demonstrated -- that he has made the proper applications to the legislature and the executive and that his applications have been unsuccessful.

The Sheriff finds significance in the fact that in October 1976 the District Court granted its own motion to join as defendants in this action the County of Dutchess, the County Executive and the County Legislature and its members. (See pp. 8-11, supra.)



The District Court clearly did not join the County defendants because they had been needed from the beginning of this action to distribute blankets to inmates, to see that inmates received proper medication or to promulgate rules and regulations for inmate behavior. The joinder of the County defendants did not become necessary until it became sadly apparent to the District Court that further contempt sanctions against a recalcitrant Sheriff would not likely provide the relief that only an active and concerned administrator could provide. The District Court joined the County defendants at a time in this litigation when the attention of the Court and counsel was turning to the possible appointment of a receiver and the legal and practical problems which would attend that step. (See pp. 10-11, supra.)

The Sheriff cannot argue that joinder of parties made necessary by his own gross abdication under the 1973 Stipulation and Order as well as under the 1976 contempt order somehow infects this action from its roots and voids a contempt finding. The Sheriff distorts the District Court's action in stating that the June 1976 contempt opinion "was modified by the Court's own motion to include the County Legislature and County Executive and the County of Dutchess as party defendants in this action . . . ." (De-

fendant-Appellant's Brief at 15.) It was the Sheriff's stubborn contempt that made the joinder of these new parties necessary.



POINT III

THE AWARD OF ATTORNEY'S FEES  
AGAINST SHERIFF QUINLAN WAS  
PROPER

Most of the issues in Points II, V and VI of the Sheriff's brief are raised for the first time on appeal. As such, they are not properly before this Court, as they were never properly presented to the District Court. United States v. Vitasafe Corp., 352 F.2d 62, 63 (2d Cir.), cert. denied, 382 U.S. 919 (1965); Schwartz v. S. S. Nassau, 345 F.2d 465, 466 (2d Cir. 1965), cert. denied, 382 U.S. 919 (1969); cf. Singleton v. Wulff, 44 U.S.L.W. 5213 (July 1, 1976); Youakim v. Miller, 425 U.S. 231 (1976). The only issue raised below as to attorney's fees was the Sheriff's ability to pay, discussed infra.

In any event, the arguments made by the Sheriff against the award of attorney's fees are, for the most part, frivolous.

A Sheriff Is Subject to  
Suit Under 42 U.S.C. § 1983

The Sheriff argues that he is immune from liability in an action brought under 42 U.S.C. § 1983 (1970) and is therefore immune from an award of attorney's fees for contempt. He advances three alternative theories in support of this claim of immunity: (1) that the Sheriff is an officer of

the Court; (2) that he is an executive officer acting within his discretion; or (3) that he is a municipal subdivision.\*

This argument, like most of the Sheriff's arguments on this appeal, is not timely. The defense of immunity should have been raised in the answer or by motion prior to the 1973 Order signed by Judge Gurfein. Having entered into the Stipulation, the Sheriff waived any claim of immunity and may not raise that defense now. The Sheriff never even hinted at this issue in the District Court, and it should not be considered by this Court.

In any event, this Court has long recognized that to allow a defense of immunity in actions such as this "would practically institute a judicial repeal of the Civil Rights Acts", Jobson v. Henne, 355 F.2d 129, 133 (2d Cir. 1966).

"To the extent that state or municipal defendants . . . violate or conspire to violate constitutional and federal rights, the Civil Rights Laws, §§ 1979 and 1980(3), 42 U.S.C. §§ 1983 and 1985(3), abrogate the doctrine of official immunity." Birnbaum v. Trussell, 347 F.2d 86, 88 (2d Cir. 1965). Accord, Dale v. Hahn, 440 F.2d 633, 637 (2d Cir. 1971).

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\* The last argument is particularly empty. The Sheriff is clearly a county official (Burke v. Kern, 287 N.Y. 203, 212, 38 N.E.2d 500 (1941)) and not a municipal subdivision. See N.Y. Gen. Mun. Law § 2 (McKinney 1976 Supp.).



It is quite clear that immunity is not available to prison officials who violate the constitutional rights of prisoners in their charge. Estelle v. Gamble, 45 U.S.L.W. 4023 (November 30, 1976); Baxter v. Palmigiano, 425 U.S. 308 (1976); United States ex rel. Larkin v. Oswald, 510 F.2d 583 (2d Cir. 1975). Nor is it available to sheriffs who violate constitutional rights. Stephenson v. Gaskins, 539 F.2d 1066, 1068 (5th Cir. 1976); Kipps v. Ewell, 538 F.2d 564, 566 (4th Cir. 1976); Hazo v. Geltz, 537 F.2d 747, 751 (3rd Cir. 1976). The fact that New York sheriffs have no special exemption which permits them to violate prisoners' rights without fear of suit is demonstrated by the fact that § 1983 suits have in several instances been permitted to proceed against New York sheriffs. Jones-Bey v. Caso, 535 F.2d 1360 (2d Cir. 1976) (Nassau County Sheriff); Christman v. Skinner, 468 F.2d 723 (2d Cir. 1972) (Monroe County Sheriff); Wilkinson v. Skinner, 462 F.2d 670 (2d Cir. 1972) (Monroe County Sheriff); Black v. Amico, 387 F.Supp. 88 (W.D.N.Y. 1974) (Erie County Sheriff).\*

Where immunity does exist for a sheriff, it is a

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\* A sheriff may have judicial immunity in certain limited instances, such as where a prisoner sues a sheriff under 42 U.S.C. § 1983 claiming that the statute pursuant to which he was imprisoned was unconstitutional. In that event a sheriff is not susceptible to suit. Godwin v. Williams, 293 F.Supp. 770, 771-72 (N.D. Tex. 1968); Delaney v. Shobe, 235 F.Supp. 662, 666-67 (D. Ore. 1964). This doctrine has no application to this action, which was brought to improve prison conditions.

qualified immunity. Wood v. Strickland, 420 U.S. 308 (1975); Scheuer v. Rhodes, 416 U.S. 232 (1974). Cf. Imbler v. Pachtman, 424 U.S. 409, 419 (1976). Thus, a sheriff may be protected from suit by a "qualified privilege" if he is operating his jail in compliance with the Correction Commission Minimum Standards. Christman v. Skinner, 468 F.2d at 725. Assuming that any immunity or privilege defense can be raised in a contempt proceeding for violation of a previous court order (plaintiffs submit that it cannot), this defense should of course have been raised at the trial level. See p. 58, supra, and cases cited.\* In any event, the District Court's finding of wilful contempt of a Stipulation which incorporated the Commission's standards means that the Sheriff could not have prevailed with that defense.\*\*

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\* While immunity from a § 1983 suit is a matter of Federal law (Kletschka v. Driver, 411 F.2d 436, 448 (2d Cir. 1969)), it is quite clear that a sheriff can be liable to a prisoner under New York law. Lavigne v. Allen, 36 A.D.2d 981 (#5), 321 N.Y.S.2d 179 (3d Dep't 1971). See generally, Annotation: Civil Liability of Sheriff and Other Officers Charged With Keeping Jail or Prisoner for Death or Injury of Prisoner, 14 A.L.R.2d 353 (1950).

\*\* The cases cited by the Sheriff in support of his immunity argument are all inapposite. They either do not deal with the immunity of state or local officials in § 1983 actions, or, in two cases, deal with the immunity of Court Clerks. Indeed, Lucarell v. McNair, 453 F.2d 836 (6th Cir. 1972), was a reversal of a district court dismissal of a § 1983 suit against a Referee and Administrative Officer of the Juvenile Court of a county in Ohio.



Attorney's Fees Were  
Properly Awarded in This  
Civil Contempt Proceeding

The award of attorney's fees in contempt proceedings, codified in Civil Rule 14(a) of the Southern District of New York, is a well established doctrine of long standing in the Federal Courts. Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 443-44 (1911).\*

While Gompers discusses costs generally, and not specifically attorney's fees, it is clear from its citation of In re North Bloomfield Gravel Min. Co., 27 Fed. Rep. at 800 that such fees are allowable in civil contempt. In Bloomfield the court awarded costs to the prevailing party, and stated:

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\* See Sunbeam Corp. v. Golden Rule Appliance Co., 252 F.2d 467, 470-71 (2d Cir. 1958); Lance v. Plummer, 353 F.2d 585, 592 (5th Cir. 1965), cert. denied, 384 U.S. 929 (1966); Backo v. Local 281, United Bro. of Carpenters & Joiners, 308 F.Supp. 172, 179 (N.D.N.Y. 1969) aff'd 438 F.2d 176 (2d Cir. 1970), cert. denied, 404 U.S. 858 (1971); Sweetarts v. Sunline, Inc., 299 F.Supp. 572, 579 (S.D. Mo. 1969) aff'd in part, rev'd in part on other grounds 436 F.2d 705 (8th Cir. 1971); American Optical Co. v. Rayex Corp., 291 F.Supp. at 509; In re Walmar Screen Printing Co., 184 F.Supp. 858, 861 (S.D.N.Y. 1960); Babee-Tenda Corp. v. Scharco Mfg. Co., 156 F.Supp. 582, 588-89 (S.D.N.Y. 1957); Sabin v. Fogarty, 70 F. 482, 485 (D. Wash. 1895); Stahl v. Ertel, 62 F. 920, 923 (D. Ill. 1893); In re North Bloomfield Gravel Min. Co., 27 F. 795, 800 (D. Cal. 1886); Wells, Fargo & Co. v. Oregon R.R. & Nav. Co., 19 F. 20 (D. Ore. 1884); In re Tift, 11 F. 463, 467-68 (E.D.N.Y. 1881); Doubleday v. Sherman, F. Cas. No. 4,020 (S.D.N.Y. 1870); Moskowitz, Contempt of Injunctions, Civil and Criminal, 43 Col. L. Rev. 780, 806-07 (1943); Annotation: Allowance of Attorney's Fees in Contempt Proceeding, 55 A.L.R.2d 977 (1957); Rapalje, Contempt § 132 at pp. 183-85 (1884).

"As a compensation, in part, for the large expenses that must have been incurred in procuring evidence and prosecuting this proceeding for contempt, the money, when collected, will be paid over to complainant or his solicitors." Id.

As civil contempt does not require wilfullness (see pp. 46-47, supra), it follows that a showing of wilfullness is not necessary for an award of attorney's fees. There is authority for the proposition that wilfullness is a consideration in determining the amount of attorney's fees to be awarded in contempt. In re Federal Facilities Realty Trust, 227 F.2d 657 (7th Cir. 1955), citing Toledo Scale Co. v. Computing Scale Co., 261 U.S. 399 (1923).

Alyeska Pipeline Service Co. v. Wilderness Society, 421 U.S. 240, 258 (1975), in dictum, notes that "a court may assess attorney's fees for the 'willful disobedience of a court order . . . as part of the fine to be levied on the defendant,'" quoting Toledo Scale. See also High, Injunctions, § 640 at pp. 359-360 (1873).<sup>\*</sup> Even if wilfullness were a condition for the award of attorney's fees, wilfullness has been found by the District Court here. (126a; 419 F. Supp. at 808).<sup>\*\*</sup>

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<sup>\*</sup> It is worth noting that attorney's fees may now be awarded to successful plaintiffs in § 1983 actions. See The Civil Rights Attorneys Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641 (1976) (to be codified at 42 U.S.C. § 1988).

<sup>\*\*</sup> Bond v. Stanton, 528 F.2d 688 (7th Cir.) vacated and remanded 45 U.S.L.W. 3399 (Nov. 29, 1976) (Defendant-Appellant's Brief at 56) dealt with the question of whether an award of attorney's fees against a state official sued in his official capacity was barred by the Eleventh Amendment, and was remanded for reconsideration in light of Pub. L. No. 94-559 (see fn. above). It has no relevance here.



Attorney's Fees May Be Awarded  
to an Attorney Who Has Not  
Exacted a Fee from His Client

The Sheriff argues that attorney's fees cannot properly be awarded to the attorneys in this case because the representation was taken on pro bono publico, and without an expectation of compensation. That argument has been rejected by this and other circuits. In Torres v. Sachs, 538 F.2d 10, 13 (2d Cir. 1976) this Court, in upholding an award of attorney's fees to an independently funded organization, stated:

"Litigation to secure the law's protection has frequently depended on the exertions of organizations dedicated to the enforcement of the Civil Rights Acts. See Tillman v. Wheaton-Haven Recreation Ass'n, 517 F.2d 1141 (4th Cir. 1975). We agree with the courts which have held that the 'allowable fees and expenses may not be reduced because [the prevailing party's] attorney was employed . . . by a civil rights organization . . . or because the attorney does not exact a fee.' Fairley v. Patterson, 493 F.2d 598, 606 (5th Cir. 1975); Tillman v. Wheaton-Haven Recreation Ass'n, supra. Non-profit public interest law firms have been recognized as properly entitled to attorneys' fees, Jordan v. Fusari, 496 F.2d 646, 649 (2d Cir. 1974); Brandenburger v. Thompson, 494 F.2d 885, 889 (9th Cir. 1974), and the receipt of such fees promotes their continued existence and service to the public in this field."

Accord, Class v. Norton, 505 F.2d 123 (2d Cir. 1974);  
Jordan v. Fusari, 496 F.2d 646, 649 (2d Cir. 1974);  
Richardson v. Civil Service Commission of New York,  
420 F.Supp. 64, 68 (S.D.N.Y. 1976); Aspira of New York,

Inc. v. Board of Ed. of City of N.Y., 65 F.R.D. 541 (S.D.N.Y. 1975).

The failure of the Sheriff to comply with the Stipulation and Order of the Court has required hundreds of hours of work by plaintiffs' counsel and has caused plaintiffs' counsel to incur thousands of dollars in disbursements. The District Court received a lengthy affidavit in support of plaintiffs' claim for attorney's fees and expenses as an item of damage under Local Civil Rule 14. The District Court heard witness and argument and wrote an opinion awarding the fees and expenses and noting the "due diligence and endless entreaty and patience" exhibited by plaintiffs' counsel. (152a, 195a).

The Sheriff's assertion that the award is punitive is not supported by anything in the record. There is no statement by the District Court that the award was based on anything other than the reasonableness of the hours worked and the reasonableness of the hourly rate. Of course the District Court did not consider the ability of the Sheriff to pay, as the issue was the compensation of plaintiffs for their damages. Gompers v. Bucks Stove & Range Co., 221 U.S. at 441-42.



Attorney's Fees and Disbursements  
Were Properly Awarded for the  
Investigation As Well As the  
Prosecution of This Action

Attorney's fees are appropriately awarded not just for the prosecution of a contempt hearing, but also for the investigation leading up to such prosecution. Backo v. Local 281, United Bro. of Carpenters & Joiners, 308 F. Supp. at 129; Sweetarts v. Sunline, Inc., 299 F. Supp. at 579; American Optical Co. v. Rayex Corp., 291 F. Supp. at 588-89. Thus, in NLRB v. Int'l Hod Carriers' Bldg. & Common Laborers' Union, 228 F.2d 589, 593 (2d Cir. 1955), this Court approved an award in a civil contempt proceeding of "the expenses necessarily incurred by [the prevailing party] in connection with the prosecution of the petition in civil contempt, including counsel fees and other expenditures incurred by it in the investigation, preparation, presentation and final disposition of the petition. . . ."

The District Court awarded attorney's fees for the 1,919.2 hours of work done by plaintiffs' counsel at a requested hourly rate of \$18.50 (196a). Nearly 1,600 of these were devoted to preparation for the contempt proceeding itself (143a). The affidavit of plaintiffs' counsel documenting the time and monies devoted to this action details efforts made on several fronts since the signing

of the 1973 Stipulation and Order, all of which were calculated to secure compliance without coercion and all of which failed (133a-144a).

It is clear from the opinion of the District Court that the Sheriff was in contempt beginning at the very time the Stipulation was signed. At that very time he was committing a fraud on the Court by agreeing to install light fixtures when he believed that not to be possible. (125a; 419 F. Supp. at 807). It was within the proper judgment of the District Court to determine whether the variety of efforts made by plaintiffs' counsel to secure the Sheriff's compliance were occasioned by the Sheriff's continuing contempt and should therefore be included as an item of damage under Local Rule 14 of the Southern District of New York.



CONCLUSION

For the reasons stated above, this Court should affirm the opinions and orders of the District Court.

Dated: New York, New York  
May 11, 1977

Respectfully submitted,

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UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

- - - - - x

RAYMOND G. LASKY, et al.,	:	
Plaintiffs-Appellees,	:	Nos. 76-7426
-against-	:	77-7032
SHERIFF LAWRENCE QUINLAN, et al.,	:	AFFIDAVIT OF
Defendant-Appellant.	:	<u>SERVICE BY MAIL</u>

- - - - - x

STATE OF NEW YORK	)	
	:	ss.:
COUNTY OF NEW YORK	)	

LORRAINE DELESANTI, being duly sworn, deposes  
and says that she is over the age of 18 years; that on  
the 1st day of June, 1977 she served the annexed Brief of  
Plaintiffs-Appellees with citations to the deferred appen-  
dix on

Peter R. Kehoe, Esq.  
37 First Street  
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by depositing two true copies of the same securely enclosed  
in a postpaid wrapper in a Post Office Box regularly main-  
tained by the United States Postal Service at No. 1 Chase  
Manhattan Plaza in the City and County of New York, directed  
to said attorney at the address set out under his name;



this being the address designated by him for this purpose  
upon the preceding papers on these appeals.

*Samuel Colaneri*

Sworn to before me this

1st day of June, 1977.

*Patricia A. Connors*

PATRICIA A. CONNORS  
Notary Public, State of New York  
No. 41-5790890 - Qualified in Queens County  
Cert. Filed in New York County  
Commission Expires March 30, 1978

